84-1574

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No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JAMES GLENN ADCOCK,

Petitioner

VS.

THE UNITED STATE OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES D. DOYLE, III

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Austin, Texas 78701

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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE TEST FOR A SEARCH WARRANT AFFIDAVIT APPLIED BY THE COURT OF APPEALS MAKES IT IMPOSSIBLE TO DISTINGUISH BETWEEN MERE SUSPICION AND PROBABLE CAUSE.

WHETHER A REVIEWING COURT MAY ADD TO AND ENHANCE THE ALLEGATIONS IN A SEARCH WARRANT AFFIDAVIT, AS THE COURT OF APPEALS DID, OR ARE THE CONCLUSIONS TO BE DRAWN LIMITED TO THE ACTUAL LANUGAGE OF THE AFFIDAVIT.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, James Glenn Adcock, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 7, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is an unpublished per curiam opinion rendered January 7, 1985. A copy of the opinion is included in the Appendix as Exhibit A. A copy of the District Court's Order denying Petitioner's Motion to Suppress is included in the Appendix as Exhibit C.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. § 1254 (1) for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. A written per curiam opinion was issued by that court on January 7, 1985. The petitioner, James Glenn Adcock, timely

filed a suggestion for rehearing in banc. That petition was denied by the Court of appeals on February 4, 1985. A copy of the order denying rehearing in banc is included in the Appendix as Exhibit B.

The petitioner's request for stay of the mandate in this cause pending review by certiorari to the United States Supreme Court was denied by Circuit Judge Gee on February 21, 1985. The record in this cause was lodged with the Clerk of the United States District Court for the Western District of Texas, Austin, Texas, on March 6, 1985, with the return of the mandate to that court.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The case before the Court is a federal criminal prosecution for possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841(a) (1).

On September 12, 1983, Texas State District Judge Jon Wisser signed a search warrant, authorizing a search of defendant's residence at 603 Cutlass, Village of Lakeway, Texas. (Govt. Exhibit

5). This warrant was based on an affidavit submitted by Agent Robert B. Nestoroff of the Texas Department of Public Safety. The affidavit describes the stop of a taxi driven by Franz Selby, co-defendant, for alleged traffic violations. Selby was arrested, and a search of his taxi revealed an envelope containing one ounce of cocaine in the glove compartment. The search warrant was executed at approximately 4:45 a.m. on September 12, 1983, and approximately two pounds of cocaine were seized from defendant's residence. (R. II-76,77). No one testified that Selby was seen in defendant's residence at any time. (R. I-48).

On September 21, 1983, the Grand Jury returned the indictment in this

cause, charging defendant with conspiracy to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846, distributing cocaine, in violation of 21 U.S.C. § 841(a)(1), and possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). (R. I-156). On December 5 and 7, 1983, hearing was had on defendant's Motion to Suppress Evidence and for Return of Property. (R. II-2-183). On December 22, 1983, the Honorable H. F. Garcia denied defendant's Motion to Suppress by written order. (R. I-17). On January 10, 1984, defendant filed a jury waiver. (R. I-45). On January 11, 1984, defendant and the Government announced ready and trial was had before the District Court. The District Court

granted defendant's motion for judgment of acquittal as to Count I (conspiracy), and entered judgments of guilty as to Counts II (distribution) and III (possession). (R. II-248, 249). On February 27, 1984, the Court granted defendant's Motion to Set Aside Finding of Guilty as to Count Two and for Judgment of Acquittal, found defendant not guilty of same, and sentenced defendant on Count III to a term of imprisonment for a period of twelve years plus a Special Parole Term of five years. (R. II-250,254). On March 8, 1984, defendant filed his Notice of Appeal. (R. I-8). On January 7, 1985, a panel of this court, in a per curiam decision, affirmed the judgment of the trial court and found that there was probable cause

for issuing the search warrant. (Appendix A)

REASONS FOR GRANTING THE WRIT

WHETHER THE TEST FOR A SEARCH WARRANT AFFIDAVIT APPLIED BY THE COURT OF APPEALS MAKES IT IMPOSSIBLE TO DISTINGUISH BETWEEN MERE SUSPICION AND PROBABLE CAUSE.

WHETHER A REVIEWING COURT MAY ADD TO AND ENHANCE THE ALLEGATIONS IN A SEARCH WARRANT AFFIDAVIT, AS THE COURT OF APPEALS DID, OR ARE THE CONCLUSIONS TO BE DRAWN LIMITED TO THE ACTUAL LANGUAGE OF THE AFFIDAVIT.

In its Opinion in this cause, the Court of Appeals has attempted to graft an isolated phrase from the plurality opinion in Texas v. Brown, _____ U.S. _____, 103 S. Ct. 1535 (1982) to the prior enunciations of the probable cause standard set forth by this Court in Illinois v. Gates, _____ U.S. _____, 103 S. Ct. 2317 (1983). This attempt results

in a new standard of probable cause which has no lower threshhold or limit, and seemingly creates a test of "any probability." The Court of Appeals then takes this new standard and applies same, not to the facts alleged in the search warrant affidavit, but to conclusions and enhanced allegations neither urged or found by any party or other tribunal in this cause.

Rather than holding a patently inadequate affidavit to be sufficient, the Court of Appeals should have conceded the affidavit to be short of probable cause, and then faced the real issue: whether the evidence seized is nevertheless inadmissable under the test set forth in United States v. Leon, _____ U.S. _____, 104 S. Ct. 3405 (1984). As

the panel noted in footnote 1 on page 2 of its opinion, the trial court found that certain statements in the affidavit were "misleading" and struck same from consideration. Because the affiant who made the misleading allegations was the same officer who executed the warrant, an excellent fact situation is presented here for this Court to provide much needed guidance on how the Leon "good-faith" test is to be applied in practice.

A. The Court's decision confuses the meanings of "probable" and "probability", and results in a test which erases the distinction between probable cause and mere suspicion.

In its attempted restatement of the current law concerning probable cause for

search warrants, the Court of Appeals concludes its review of the affidavit and its opinion by stating that the warrant established, a "practical, non-technical" probability. Slip Opinion at 3.

A "probability", without a modifier indicating degree of strength, is a meaningless concept. There is a "probability" that the sun will rise tomorrow in the west rather from the east; that probability is zero. And probabilities can vary upward from zero to one hundred percent. To merely say a "probability" exists has no function; a probability of .00001% is still a probability.

On the other hand, if something is "probable", it is more likely than not. Black's Law Dictionary (4th Ed. 1968).

The Court of Appeals apparently still holds that mere suspicion is insufficient in a search warrant affidavit (Slip Opinion at p.3), but the test stated in the immediately following phrase challenges one to the impossible task of finding the delineation between mere suspicion and minimal probable cause.

The Court of Appeals clearly does not set a limit of a 50%-plus probability for this delineation, as it specifically finds the affidavit sufficient,

> although the presence of cocaine on the premises was not shown by it to be more likely than not.

Id. (emphasis added).

Paraphrased, the Court finds in this excerpt that it was unlikely that cocaine would be found, yet sustains the

intrusion into defendant's home.

This "unlikelihood" dilemna in the Court's opinion can be traced to the Court's adoption of language from Texas v. Brown, supra. This was a plurality opinion, with three separate concurring opinions filed, which this Court itself elected to not even refer to in Illinois v. Gates, supra. The language in Texas v. Brown that "it does not demand any showing that such a belief be more likely true than false" arose in the context of a plainview automobile search. 103 S. Ct. at 1538, 1543. In the instant case, we do not have an officer legitimately standing next to a stopped vehicle on a public road; this is a search of a home. The greater the intrusion, the greater must be the reason for conducting a

search. Security and Law Enforcement Employees, AFL-CIO by Clay v. Carey, 737 F.2d 187 (2nd Cir. 1984). Surely the Court cannot be contending that a probability of five or ten percent is sufficient to justify searching a person's home. Especially in the case of a residence, the requirement of a finding that it is more likely than not that contraband will be found, a 50%-plus probability, seems a justifiable and workable test. This seems to be the interpretation intended by the Supreme Court and the Court of Appeals:

> The standard for determining whether probable cause exists to issue a search warrant is if the magistrate was provided with sufficient reliable information from which he could reasonable conclude that the items sought in the warrant were probably at the location sought to be searched.

United States v. Phillips, 727 F.2d 392, 394 (5th Cir. 1984); United States v. Kolodziej, 712 F. 2d 975, 976 (5th Cir. 1983) (Emphasis added).

If the Court of Appeals, in its opinion in this cause, means that a less than 50% probability is required ("not shown by it to be more likely than not"), where does one draw the line for the lower threshhold of probable cause? A probability of .00001 is nevertheless a "practical, non-technical probability." Is that enough to send a group of officers into a home?

The Court's decision is contrary to the prior standards of review for such cases, such as may be found in United States v. Kolodziej, and United States v.

Phillips, supra. The simple, workable test stated in those cases is whether a magistrate could reasonably conclude the terms sought "were probably at he location" sought to searched. 727 F.2d at 394; 712 F.2d at 976. Under the decision announced in the present case, a lesser standard is created, in that the affidavit apparently need not establish that the items are "probably" there.

B. The Court of Appeals has impermissibly added to the allegations of the affidavit in its review, rather than confining itself to the four corners viewed by the issuing magistrate.

On page 2 of its opinion, the Court of Appeals restates those portions of the affidavit which it views as probative on the probable cause question:

1. Cab driver Selby was apprehended with a small quantity of cocaine.

This is correct.

2. Selby had driven Adcock to 603 Cutlass (Adcock's residence) "a lengthy trip", without charging a money fare.

There is nothing in the affidavit implying, contending, stating, or indicating Adcock was ever in the taxi. The trial court did not so find, and even the government has never so contended. There is nothing in the affidavit saying this is "a lengthy trip". The affidavit states Selby had $16.25 in his possession when he was arrested; there is nothing in the affidavit saying why this would not equal or exceed a fare for the "lengthy trip". The Court simply, without comment, adds all of these things to the

affidavit, creating from nothing a connection between the taxi driver and appellant. Drawing conclusions is one thing, but adding to an affidavit has never been permissible.

3. Selby's claim to not know Adcock was false.

This is in the affidavit, but meaningless as to contraband in the home.

4. That Selby had probably entered the premises at 603 Cutlass before he was apprehended with the drug.

It is logical to conclude Selby entered the premises before he was apprehended, however, the question is did he enter the premises before he obtained the drug. Nothing in the affidavit makes the home a more likely source; elsewhere the affidavit speaks of (1) a cocaine

investigation throughout the Village of Lakeway and (2) a "load" of cocaine in the entire Lakeway area. These two allegations lessen the probability that the source was this particular Lakeway address.

5. 603 Cutlass was frequented by persons having connections with drug smuggling.

The Franks hearing testimony established that only the vehicle owned by one person with even an arrest for any narcotics offense had been seen, despite constant surveillance of 603 Cutlass. "Frequent" connotes often; persons connotes more than one. The Franks hearing shows this was not true. (R. II-59; Adcock Exhibit A).

6. Adcock was arrested a few months earlier for possession of cocaine.

This is correct. Is this probable cause to enter and search a home months late?

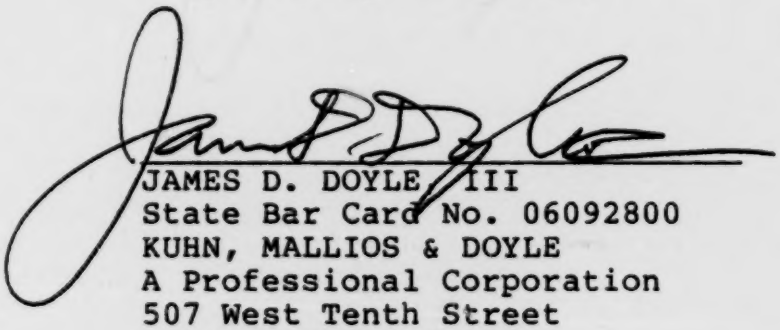
The above six items are every bit of information the Court relies on to find probable cause to send officers into appellant's home. No one says cocaine is there. No one saw cocaine there. No one even says they have heard that cocaine is there. The Court is correct when it says "the presence of cocaine on the premises was not shown by (the affidavit) to be more likely than not." The Court errs however when it concludes that despite such a total lack of evidence, "no more was required."

CONCLUSION

For the reasons stated, defendant-appellant James Glenn Adcock respectfully prays that this Court grant this petition and, upon hearing, reverse the judgments of the court below, suppress the evidence seized pursuant to the execution of the search warrant, and remand this cause for a new trial.

Dated this 3RD day of April, 1985.

Respectfully submitted,



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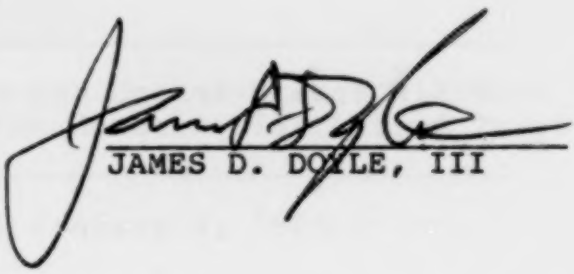
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition was served on the Solicitor General, Department of Justice, Washington, D.C. 20530, and Helen M. Eversberg, U.S. Attorney, 655 E. Durango Blvd., San Antonio, Texas 78206 this 3 day of April, 1985.



JAMES D. DOYLE, III

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-1215

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES GLENN ADCOCK,

Defendant-Appellant

Appeal from the United States District Court for the Western District of Texas

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(January 4, 1985)

Before GEE, POLITZ AND HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Adcock, convicted of cocaine possession in a bench trial, appeals on one ground: that the search warrant by

means of which two pounds of the drug were discovered in his residence was issued without probable cause. We review the sufficiency of the affidavit upon the basis of which the warrant was issued by applying to it a common sense consideration of the totality of the circumstances presented by it. Illinois v. Gates, _____ U.S.____,103 S.Ct. 2317 (1983). Probable cause, as applied to these circumstances, is that which warrants a man of reasonable caution in believing that there is a "practical, non-technical" probability that contraband is present on the premises to be searched; it does not demand a showing that the belief is more likely true than false. See Texas v. Brown, ___U.S.___, 103 S.Ct. 1535, 1543 (1982) (plurality

opinion) and cases cited.

We append the affidavit in question as an exhibit. What conclusions on the part of the issuing magistrate would this affidavit fairly support?

We conclude they are these: that Selby the cab driver, apprehended in possession of a small amount of cocaine, had delivered appellant Adcock to 603 Cutlass -- a lengthy trip -- without charging a money fare; that his claim not to know Adcock was false; that Selby had probably entered the premises at 603 Cutlass before he was apprehended with the drug; that 603 Cutlass was frequented by persons having connections with drug smuggling; and that Adcock himself had been arrested a few months earlier for possession of cocaine. 1/

1/ The trial judge found the reference to Adcock's "lengthy criminal record," contained in paragraph 13 of the affidavit, "misleading" in view of the fact that he had prior arrests but no convictions. He therefore disregarded it, was do we.

Applying the tests that we have stated above, we conclude that the affidavit establishes probable cause for the search. Although the presence of cocaine on the premises was not shown by it to be more likely than not, it established far more than a mere suspicion" a "practical, non-technical" probability. No more was required.

AFFIRMED.

EXHIBIT #1

1. On Sunday night September 11, 1983, at approximately 10:11 P.M., Village of Lakeway Police Officer, Dick Williams, stopped Roy's Taxi #166 a 1979 Chevrolet, 4 door, bearing 1984 Texas license 694-DBE at 1400 Lakeway Drive in the Village of Lakeway. Officer Williams had observed the vehicle weaving and travelling at a high rate of speed and believed that the driver was intoxicated.

2. The driver of the taxi verbally identified himself to Officer Williams as Franz Karl Selby. However, he was unable to produce a valid Texas driver's license or any other identification so that Officer Williams could verify who he was. Due to the fact that Selby was unable to positively identify himself, Officer Williams arrested Selby and requested via his dispatcher that someone be sent to drive the taxi to the Police Department.

3. As a matter of Village of Lakeway Police Department police, Officer Williams inventoried the vehicle prior to having it driven to the Police

Department. While conducting his inventory Officer Williams found a plain white envelope in the glove compartment. Although the envelope was sealed, Officer Williams could feel that the envelope contained a power substance. Officer Williams suspecting that the envelope contained a controlled substance, asked Selby about the envelope and Selby replied, "I don't know, its not mine. You can open it if you want to."

4. Suspecting that the envelope contained narcotics, Officer Williams opened the envelope and noted that the envelope contained a clear plastic bag which contained a white powdery substance.

5. Officer Williams completed his inventory of the vehicle and had Village of Lakeway Fireman, John Addison, drive the taxi to the Lakeway Police Department where the taxi was secured. Officer Williams transported Franz Selby to the Lakeway Police Department.

6. At the Village of Lakeway Police Department Officer Williams and Chief of Police Tom Evans, conducted a field test on the white powder substance using a

field test from Scott Reagent System Test G. The test reacted positive for the presence of cocaine.

7. The taxi driver, Franz Selby, advised Officer Williams that he had been flagged down at South Lamar and La Casa in Austin, Texas by two white males who requested transportation to 603 Cutlass in Village of Lakeway. Officer Williams recalled observing the taxi parked unattended in the driveway at least thirty minutes prior to the arrest of Selby.

8. Chief of Police, Tom Evans, had been aware of the residence at 603 Cutlass since at least May of 1983, and knew the residence to be rented by James Glenn Adcock, a white male, date of birth 11-30-46. Chief Evans knows that Adcock is a suspected cocaine dealer.

9. Chief Evans asked Selby again about the two men that he had transported to 603 Cutlass. Selby was very vague and could not describe the men. He advised that he had charged the men $15.00 to take them to Lakeway. However, at the time of his arrest Selby had only $16.25 in his possession even

though he had been on duty since 7:00 P.M. and had transported three other fares prior to picking up the three men for a total of $12.20. Selby should have been in possession of a least $27.20 for the evenings fares.

10. Selby insisted to Chief Evans that he did not know the two men he had transported to 603 Cutlass or the occupants of 603 Cutlass. However, at the time of his arrest Selby was in possession of a list of personal telephone numbers including one marked J.A. and telephone number 261-5554. This telephone number is connected at 603 Cutlass at the residence of James Glenn Adcock. The telephone is connected in the name of Jim Hancock and has been connected in that name since James Glenn Adcock moved into 603 Cutlass.

11. Chief Evans contacted affiant because he was aware that affiant is conducting a narcotic smuggling investigation in which James Glenn Adcock's name has surfaced. As part of the narcotic smuggling investigation, affiant had subpoenaed the telephone tolls from telephone number 261-5556.

12. Affiant noted that another phone number on the list of personal phone numbers seized from Selby at the time of his arrest was a number 445-6973 with the name Pete written out beside the number. When affiant obtained long distance telephone records for 261-5554 affiant noted that a reference by the name of Pete Huffmann with a telephone number of 445-6973 was given. Affiant has learned that Pete Huffmann has been previously arrested for narcotic smuggling.

13. In checking the criminal background on James Glenn Adcock affiant has learned that Adcock has a lengthy criminal record including arrest for dangerous drugs and was arrested by the Austin Police Department on May 16, 1983 for possession of cocaine.

14. On Sunday September 11, 1983, at approximately 2:00 P.M. Austin Organized Crime Unit Sgt. Malcolm Mills received a telephone call from a previously reliable confidential informant that a load of cocaine had arrived in the Lakeway area. Sgt. Mills has been conducting a narcotic investigation in the Lakeway area for approximately two months. One of the

residences that has come to the attention of Sgt. Mills as a result of information is 603 Cutlass in the Village of Lakeway, the residence of James Glenn Adcock.

15. As a result of narcotic investigations being conducted by the Village of Lakeway Police Department, the Texas Department of Public Safety Narcotics Service and the Greater Austin Area Organized Crime Control Unit the residence at 603 Cutlass has been under almost constant surveillance. Numerous vehicles have been observed coming and going from the residence which are registered to persons with prior drug arrests and convictions.

16. Wherefore affiant feels that probable cause exists to believe that the suspected cocaine found by Officer Williams was obtained from the residence at 603 Cutlass by defendant Franz Karl Selby. This belief is strengthened by the false statements made by Selby at the time of his arrest about his relationship with persons at 603 Cutlass.

17. Affiant has discussed the merits of this case with assistant U.S. Attorney Archie Carl Pierce who advised that sufficient cause exists to believe that a controlled substance, to-wit: cocaine, is concealed at the residence at 603 Cutlass.

/S/Robert B. Nestoroff
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME by each of said Affiants whose name is signed above on this the 12th day of September, 1983.

/S/Jon N. Wisser
MAGISTRATE

A-12

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-1215

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES GLENN ADCOCK,

Defendant-Appellant

Appeal from the United States District Court of the Western District of Texas

---

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 1/7/85, 5 Cir., 198__, _____ F.2d _____)

(February 4, 1985)

Before GEE, POLITZ AND HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/THOMAS GIBBS GEE
United States Circuit Judge

A-14

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

VS.

CRIMINAL NO. A-83-CR-102(1)

JAMES GLENN ADCOCK

Defendant

O R D E R

On the 5th and 7th days of December, 1983, came on to be heard the motion of defendant Adcock to suppress illegally seized evidence, which evidence is listed in the motion, and was seized pursuant to the execution of a search warrant at defendant Adcock's residence at 603 Cutlass in the Village of Lakeway, Travis

County, Texas on September 12, 1983. Initially, it is argued that the search warrant was issued without probable cause in violation of the Fourth Amendment. The leading authority on the current status of the law regarding search warrants is Illinois v. Gates, 103 S.Ct. 2317 (1983).

In Gates, the Supreme Court abandoned the two-step approach of Aguilar and Spinelli in favor of a more flexible test which considers the totality of the circumstances. The veracity and reliability of the informant, as well as the basis of his knowledge, are now matters to be considered in weighing all the circumstances. Id, at p. 2328. Only the probability, and not a prima facie

showing, of criminal activity is the standard of probable cause, Id, at 2330. The issuing magistrate's probable cause determination comports with the Fourth Amendment if the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing. Id, at 2331. This Court has thoroughly examined the affidavit attached to the search warrant, and concludes that, utilizing the totality of circumstances approach, the warrant herein was issued with probable cause.

Defendant Adcock asserts that the allegations that he is a "suspected cocaine dealer" who has associated with persons with "prior drug arrests and convictions", cannot establish probable cause to issue a warrant. It is true

that the critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the "things" to be searched for and seized are located on the property to which entry is sought. See, Zurcher v. Stanford Daily, 436 U.S. 547, 556, 98 S.Ct. 1970, 1976-77, 56 L.Ed. 2d 525 (1978). It is also true that a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. See, Ybarra v. Illinois, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979). Neither will mere suspicion support a finding of probable cause. Had this warrant been issued on mere suspicion or only because

of defendant Adcock's acquaintances or his own prior activity, this Court would be inclined to grant the pending motion.

Examination of the affidavit, however, reveals several facts, which considered as a whole, are sufficient to establish probable cause. Defendant Adcock's prior arrests for offenses, including cocaine (which was named in the warrant), and the fact that this residence was frequented by persons with prior drug arrests and convictions, are factors which can be considered. Evidence indicated that defendant Adcock has an arrest record but no convictions. The allegation in the affidavit that he has a "lengthy criminal record" is misleading and shall, henceforth, be construed as referring only to prior

arrests. The affidavit states that a previously reliable confidential informant gave information that a load of cocaine had arrived in the Lakeway area. A two month narcotics investigation in the Lakeway area led police to suspect illicit drug activity at 603 Cutlass. On September 11, 1983, co-defendant Franz Karl Selby was arrested in the Village of Lakeway. The taxi he was driving was stopped for traffic violations and because the officer believed defendant Selby was intoxicated. When he failed to produce a driver's license, he was arrested and an inventory of the contents of his taxi was taken. The inventory of the glove compartment revealed what was later determined to be cocaine. The same officer who arrested defendant Selby had

observed his taxi parked unattended in the driveway of 603 Cutlass at least thirty minutes prior to the arrest. Defendant Selby told the arresting officer he had brought two men from Austin to 603 Cutlass. He also stated he did not know the two men or the occupants of 603 Cutlass, though, at the time of his arrest, defendant Selby was in possession of a list of personal telephone numbers including one marked J.A. with telephone number 261-5554. This telephone number is connected at 603 Cutlass at the residence of defendant James Adcock. Another phone number in defendant Selby's possession belonged to another person previously arrested for narcotics smuggling.

The totality of the circumstances

indicates that the magistrate had a substantial basis for concluding that a search of 603 Cutlass would uncover cocaine. Defendant Adcock had been involved with cocaine in the past and was currently associating with persons who had also been involved with drugs. A load of cocaine had arrived in the Lakeway area. Defendant Selby who lied about his association with defendant Adcock, was arrested with cocaine in his possession after being inside defendant Adcock's residence at 603 Cutlass. This Court concludes that there was probable cause to believe that cocaine would be found at 603 Cutlass.

Generally, only items described in a search warrant may be seized. An exception to this general rule, however,

is found where a police officer has a warrant to search a given area for specified objects and in the course of the search comes across some other article of incriminatory character; the property is then seizable. Also, property which has a sufficient nexus to the crime being investigated may be seized at the time officers are properly executing a warrant authorizing a search for other items. Garland v. Maggio, 717 F.2d 199, 206 (5th Cir. 1983). The money, personal papers and personal pictures seized at 603 Cutlass were properly taken as potential items of evidentiary value. Since defendant Adcock's possession of the firearms was probably illegal, the seizure of them was also proper. Although the warrant was

executed at night, this was permissible. The money, personal papers and personal pictures seized at 603 Cutlass were properly taken as potential items of evidentiary value. Since defendant Adcock's possession of the firearms was probably illegal, the seizure of them was also proper. Although the warrant was executed at night, this was permissible either under state law (the warrant having been issued and executed by state personnel) or under Title 21 U.S.C. Section 879 (governing warrants relating to offenses involving controlled substances).

It is therefore, ORDERED that the motion to suppress of defendant Adcock be, and it hereby is, DENIED.

SIGNED and ENTERED this 22nd day of December, 1983.

H. F. GARCIA
UNITED STATES DISTRICT JUDGE